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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1954

No. 670

HERSCHEL S. GREEN and MADGE GREEN,
Petitioners,

versus

OSCAR L. GREEN, ROBERT A. GREEN,
QUENTIN L. GREEN and ALICE GREEN
Respondents.

PETITION FOR REHEARING OF HERSCHEL S. GREEN AND MADGE GREEN, PETITIONERS

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To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Herschel S. Green and Madge Green, by G. W. Horsley and L. H. Lenz, their attorneys, respectfully petition this Honorable Court for a rehearing and reconsideration of the order of this Honorable Court entered on April 25, 1955 denying their Petition for Writ of Cer-

tiorari to the United States Court of Appeals for the Seventh Circuit.

Your Petitioners respectfully show:

I.

That the practical effect of this Court's decision is to sustain the assertion of jurisdiction by Federal District Courts in matters involving an accounting of a Trustee. It is evident that this is a matter which has traditionally been handled by the courts of the individual states. To the time of this decision resort to Federal District Courts has only been had in cases where the rights and interests of a party in a trust res are disputed. This Court made that clear in the case of *Princess Lida v. Thompson,* 305 U.S. 456, 59 S. Ct. 275 (Pet. for Writ of Cert. p. 13). There, this Court distinguished the *Commonwealth Trust Co. v. Bradford* case, stating that there was in the Princess Lida case no situation wherein the plaintiff was seeking an adjudication of his interests as a basis of a claim against a fund in the possession of a state court.

None in this case has disputed the right of Oscar L. Green and the other beneficiaries to participate in the income or corpus of the trusts. There is also no dispute as to the proportion of participation in this income or corpus by any of the parties. As was stated in the Princess Lida case, the contentions are solely as to the administration and restoration of corpus. The Federal Courts which have applied this decision have consistently made this distinction, and we petition this Court not to allow this departure by the Court of Appeals for the Seventh Circuit from the decision of this Court.

Petitioners further ask this Court to further consider the logic of applying the Princess Lida doctrine in a case

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where the jurisdiction of the state court in trust matters is set forth by statute and not so applying it where the jurisdiction consists of the inherent power of a court of equity given that court by a general statute conferring equity jurisdiction upon it. There is no valid distinction and the Princess Lida doctrine should apply in this case, even though the circuit courts of Illinois are by statute given the inherent power of courts of equity but not express statutory jurisdiction in trust matters.

Petitioners ask this Court to again review the statement of facts in their Brief, for they contend that those facts show that the action in the Circuit Court of Crawford County was an action quasi in rem and that the Federal District Court had no right or jurisdiction to interfere with the prior, exclusive jurisdiction of that Court under the doctrine of the Princess Lida case.

II.

Petitioners ask this Court to again consider the sharp conflict in the thinking of the judges of the Court of Appeals regarding the question of diversity of citizenship. Judge Schnackenberg cited both, Federal and Illinois cases, holding that Madge Green as a contingent remainderman was an indispensable party to the suit. (Petitioners' Brief pp. 47-50.) It is further evident from the opinion of Judge Schnackenberg (pp. 51-53) that he was of the opinion that where there was no showing of a similarity of interests between Madge Green and the other Defendant, Herschel S. Green, that she must be realigned as a party plaintiff.

In the concurring opinion of Judge Major, he took issue with Judge Schnackenberg regarding the indispensability of Madge Green as a party to the proceeding and even if an indispensable party he felt she should not be realigned because of her attitude in the controversy. Petitioners

contend that the opinion of Judge Major on this point does not represent the opinion of this Court. We again call the Court's attention to what we believe is the holding of this Court, in *Hamer v. N. Y. Railways Co.*, 244 U. S. 266, to the effect that even though there is a refusal to sue on the part of an indispensable party, that party must still be realigned as a plaintiff for purposes of diversity of citizenship, where there is no other showing of similarity of interests with that of the other defendants. Certainly, that is the meaning of the Hamer case and it is the meaning accepted in the other Federal cases such as *Grand County Deposit Bank v. McCampbell*, 194 Fed. 2d, 469, C. C. A. 6th cited on page 30 of Petitioners' Petition for Writ of Certiorari. Petitioners further contend that under the doctrine of this Court on diversity of citizenship, as set forth in *Indianapolis, et al v. Chase National Bank, Trustee, et al*, 314 U. S. 63, Madge Green should have been realigned as a party plaintiff and the case dismissed from the District Court for lack of jurisdiction based upon diversity of citizenship.

It is with ample reason that this Court, in the Indianapolis case, said that the statute conferring diversity of citizenship jurisdiction upon the Federal Courts must be strictly construed. One relies the practical implications of the decision of this Court from the fact that it now takes approximately 4 years to conclude a civil case in the U. S. District Court of the Southern District of New York. The decision of this Court places the burden upon the U. S. District Courts of deciding matters of accounting by a trustee when there is no showing whatsoever that the state courts cannot give ample relief. Petitioners contend that this is not the meaning of the decision of this Court in the Princess Lida case. There is absolutely no reason for the U. S. District Court taking jurisdiction in this case, aside

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from the matter of the personal choice of the plaintiffs. It is, perhaps, unnecessary to note the extreme complexity of hearings involving a trustee's accounting and the time that will be unnecessarily consumed in the Federal Courts on this essentially state matter.

It seems evident that the question of who are indispensable parties in an accounting suit against a trustee should be determined by the law of the state wherein the trust res is located. Certainly, if the U. S. District Court is to assume jurisdiction in these matters, its decisions should be consistent with those of the state courts in similar question. Judge Schnackenberg rightly concluded that the matter should be determined by the law of Illinois. Petitioners contend that the law of Illinois makes Madge Green an indispensable party in this proceeding. The Petitioners have cited cases which hold that even in a situation where a party refuses to sue, he must be aligned according to his interests in the controversy. The Respondents have cited no cases which show that this is not true, except cases where the party to be realigned is shown by the pleadings to be intricately involved in the controversy, so that some relief must be given against him.

The case of Venner v. Great Northern Railway Company, 209 U.S. 24, which this Court decided and which is referred to on page 28 of Petitioners' Brief, was a case where the party sought to be realigned was a part of an alleged, joint, fraudulent misconduct. We emphasize that those facts are not present in this case and that the record shows that no relief was asked against Madge Green and no evidence was presented to show that she is in any way involved in any alleged mishandling of funds by the Trustee Herschel S. Green.

CONCLUSION

The Petitioners contend that this Court should properly grant a petition for certiorari in this cause, based either upon the doctrine of the Princess Lida case or upon the cases which this Court has decided on the question of jurisdiction based upon diversity of citizenship. In fact, the Writ should be granted based upon both of said doctrines, which are involved in this case.

WHEREFORE, Petitioners, Herschel S. Green and Madge Green, by their attorneys, G. W. Horsley and L. H. Lenz, respectfully petition this Honorable Court for a rehearing or reconsideration of the order of this Court of April 25, 1955, denying the Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit, presented to this Court by the Petitioners herein.

And, Petitioners pray this Honorable Court to grant said Petition for Rehearing and to set forth clearly and distinctly the boundaries of the jurisdiction of the District Courts, which Petitioners contend have been blurred if not obliterated by the decisions of the lower Federal Courts in this case.

Dated this 29th day of April, A. D. 1955.

Respectfully submitted,

HERSCHEL S. GREEN and
MADGE GREEN, *Petitioners*

By G. W. HORSLEY
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CERTIFICATE OF COUNSEL FOR DEFENDANTS-APPELLANTS

G. W. HORSLEY and L. H. LENZ, being first duly sworn, hereby certify as follows:

1. That they are the attorneys of record for HERSCHEL S. GREEN and MADGE GREEN, Defendants-Appellants in the above entitled cause.

2. That the Petition for Rehearing heretofore filed in this cause by the Defendants-Appellants is presented in good faith and not for delay.

3. That although no intervening circumstances have arisen since the denial for Writ of Certiorari in this cause, affiants hereby certify that the Petition for Rehearing is restricted to pointing out important considerations as to the effect of this Court's decision both as a practical manner and the over-ruling of the decision of this Court on the questions of both the documents of the Princess Lida case and the question of jurisdiction based upon diversity of citizenship.

G. W. HORSLEY

L. H. LENZ
Attorneys for Defendants-Appellants.

SUBSCRIBED AND SWORN to before me this_____ day of_____, A. D. 1955.

IRMA M. HELM
(Seal) *Notary Public.*